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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

STATE OF ARIZONA,
PETITIONER,

vs.

MARICOPA COUNTY MEDICAL SOCIETY,
MARICOPA FOUNDATION FOR MEDICAL CARE, AND
PIMA FOUNDATION FOR MEDICAL CARE,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Abbreviations:

American Hospital Association Brief *Amicus Curiae* .... AHA Br.

Brief for Petitioner ..... Pet. Br.

California Dental Service Brief *Amicus Curiae* ..... CDS Br.

Clerk's Record ..... C.R.

Joint Appendix ..... J.A.

Joint Brief in Opposition ..... Br. Opp.

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Reply Memorandum for Petitioner ..... Reply

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SUMMARY OF ARGUMENT

Respondents' defense of their agreed-upon fee schedules is predicated upon a series of misconceptions of basic antitrust principles. They equate the unilateral decision of a single actor in the marketplace with an agreement among an association of competitors; they seem to view vertical restraints as more egregious violations than agreements among horizontal competitors; and they overlook or ignore the critical characteristics distinguishing the two complementary categories of antitrust analysis — economic integration and ancillarity. Respondents' treatment of summary judgment procedures is no better. Having failed to identify even a single issue of material fact requiring a trial, they parade a series of irrelevant and immaterial disputes while simultaneously proclaiming that this case

is now moot because they have adopted a new fee schedule.[1] The only possible arguments for avoiding *per se* illegality — economic integration and ancillarity — have not even been mentioned by respondents nor could they be since the undisputed facts conclusively negate the existence of any facts to support them.

ARGUMENT

I. ANY FEE SCHEDULE AGREED UPON BY COMPETITORS IS A *PER SE* VIOLATION EVEN IF IT IS CALLED A MAXIMUM SCHEDULE

The facts necessary for this Court's decision are clear and undisputed. Respondents' own by-laws provide for the preparation and use of "uniform, average or median fee schedules." C.R. 19, Ex. 1, at 2-3. Respondents' fee schedules have, in fact, served this function. *See* Pet., at 3-5; Reply Apps. A-C; Pet. Br., at 2-12. Thus, respondents concede that they have established their fee schedules at levels above the average fees computed in price surveys and that following adoption of new schedules 85 to 95 percent of their members charged prices equal to or above those adopted. *See* Pet. Br., at 7 n.7. Despite these admitted facts, respondents persist in arguing that they only set the maximum fees their members receive under foundation-endorsed pre-paid health plans.[2] Even under their own characterization of the facts, however, respondents'

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[1]Respondents' claim of mootness is without merit. The competing physicians have done no more than select an agent for formulating their fee schedules which in itself is unlawful, *see, e.g., United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); and certainly places the case within the category of conduct "capable of repetition, yet evading review." *E.g., Dunn v. Blumstein*, 405 U.S. 300, 333 n.2 (1972). In any event, the present case seeks declaratory as well as injunctive relief, J.A. 1, 11, which, by itself, keeps it from becoming moot. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974).

[2]Resp. Br., at 15. Under respondents' theory, they hold prices down in order to stave off competition from health maintenance organizations, but this is no defense since "a combination or conspiracy to fix and control prices . . . [to exclude] any attempted intrusion by competitors" is itself unlawful. *American Tobacco Co. v. United States*, 328 U.S. 781, 800 (1946).

conduct is unlawful because any adoption of a fee schedule by competitors is a *per se* violation.[3]

It has long been recognized that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). *Accord United States v. McKesson and Robbins, Inc.*, 351 U.S. 305, 310 (1956) ("It makes no difference whether . . . the agreement is to raise or to decrease prices."). In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), this Court applied *Socony* and held that "agreement[s] among competitors to fix maximum . . . prices of their products . . .no less than those to fix minimum prices . . . [are] illegal *per se*." *Accord Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The other Courts of Appeals considering

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[3]To be sure, the *Goldfarb* Court did intimate that a "purely advisory fee schedule issued to provide guidelines" might not present the same question of *per se* illegality. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781 (1975). It is respectfully submitted that this statement was an unfortunate *obiter dictum* which should now be corrected by this Court. This Court should hold that any fee schedule adopted by a group of competitors -- even if it is claimed to be purely advisory -- is *per se* unlawful. *See United States v. National Association of Real Estate Boards, supra*, 339 U.S., at 713-14, 717 (1950); *United States v. Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800, 805 (D. Kan. 1955), *aff'd*, 355 U.S. 10 (1957).

It is extremely improbable if not inconceivable that a group of competitors would ever adopt a fee schedule that was not intended to influence future prices. Why, after all, would a group of competitors expend the effort of preparing a fee schedule and risk a close brush with illegality if the fee schedule were not intended to have some prospective effect on prices? And, of course, if it were adopted for the purpose of influencing prices it would be *per se* unlawful even if the competitors did not have the power to implement their agreement. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Since part of the rationale of the *per se* rule is the judicial efficiency in "avoid[ing] the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved," *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958), even so-called "advisory fee schedules" should be held to be *per se* unlawful so that the courts can be spared "an incredibly complicated and prolonged economic investigation" in the hope of proving the implausible fact that the advisory fee schedules were not intended to have any effect.

this issue have followed *Kiefer-Stewart* and held horizontal maximum price-fixing *per se* unlawful. *See* Pet., at 13 n.31. The lower courts did not follow these precedents, however.[4]

Respondents no longer try to defend the rationale of either of the lower courts, *compare* Resp. Br., at 40-45, *with* Br. Opp., at 21-22, but instead argue that *Kiefer-Stewart* and *Albrecht* either were overruled or sharply limited by *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), *see* Resp. Br., at 42-43, and then suggest that an agreement among competing sellers on how much they will receive should be treated the same as a single purchaser's unilateral decision of how much it will pay. *Id.*, at 44 n.122. As for respondents' argument that *Continental T.V.* makes *Kiefer-Stewart* and *Albrecht* "suspect," Resp. Br., at 41, suffice it to say that this Court has recently cited and followed those precedents in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102, 103, 109 (1980), and they therefore retain their vitality. Respondents' further attempt to limit *Kiefer-Stewart* and *Albrecht* is based on their apparent belief that vertically-imposed restraints of trade are more egregious than horizontal ones, Resp. Br., at 45, but this argument is supported only by a citation to *Continental T.V.*, which actually stands for the opposite proposition. In *Continental T.V.*, after all, this Court applied the Rule of Reason to a vertically-imposed territorial allocation while recognizing the continued applicability of the *per se* rule to horizontal territorial divisions. *See* 433 U.S., at 57 n.27, *citing*

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[4]Relying on *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the District Court declined to follow *Kiefer-Stewart* because it perceived "a recent antitrust trend . . . where the Rule of Reason [rather than the *per se* rule] is the preferred method of determining whether a particular practice is in violation of the antitrust law," Pet. App. D, at 43, but the recent decisions in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), belie any such retreat from the *per se* rule. The Ninth Circuit was more blunt and said simply, "This circuit has not extended [*Kiefer-Stewart* and *Albrecht*] to horizontal agreements that establish maximum prices," 643 F.2d, at 557 n.4, but this ignores the fact that the agreement in *Kiefer-Stewart* was horizontal. Interestingly, the only authority which the Ninth Circuit cited in connection with its peculiar conclusion was one which argued that horizontal maximum price-fixing was *per se* unlawful. L. Sullivan, Antitrust 210 (1977), *cited at* 643 F.2d, 557 n.4.

United States v. Topco Associates, Inc., 405 U.S. 596, at 608 (1972).

The gravamen of respondents' defense of their maximum price-fixing scheme therefore comes down to a fundamental misconception of the antitrust laws equating the unilateral action of a single participant in the marketplace with an agreement among competitors establishing and using a price list. Respondents criticize the State of Arizona, for example, for establishing the maximum amounts it will pay in certain governmentally-funded health plans[5] and on that basis complain that "[p]etitioner itself was shown to engage in the very conduct it seeks to enjoin." Resp. Br., at 23. To the same effect, respondents perceive some inconsistency between the Department of Justice's approval in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), of a third-party payor's unilateral decision establishing how much it would pay and its condemnation here of an agreement among competitors on how much they would receive.[6]

That respondents even advance this argument evidences a fundamental ignorance of the essence of a section 1 violation. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits a "contract, combination . . . or conspiracy in restraint of trade." Under either the *per se* rule or the Rule of Reason, what is unlawful is the agreement. A single trader may lawfully decide how much it will pay or how

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[5]Resp. Br., at 14, 22-23. The State of Arizona has established maximum fee schedules for the amounts it will pay to physicians under its workmen's compensation program and its medical and dental program for foster children. J.A. 472-74. Respondents note that for some services the State provides for "higher maximum reimbursement levels than respondents," Resp. Br., at 22, but this is of no moment. It may well be, for example, that the State of Arizona has decided to set maximum levels at a sufficiently high level in order to maximize the number of physicians who will treat foster children or injured workmen but this is no justification for a group of competitors to agree upon a sufficiently high level of payment necessary to satisfy a majority of their members.

[6]Resp. Br., at 44 n.122. The California Dental Service as amicus curiae also seems to have overlooked the important distinction recognized by the Department of Justice. From all that appears in its brief and the reported decision, *Manasen v. California Dental Service*, 1981-1 CCH Trade Cas. ¶ 63,959 (N.D. Cal. 1980), the California Dental Service is simply an independent third-party payor and is not a combination of competitors.

little it will accept even though an agreement among competitors to accomplish the same end would be unlawful. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). *See also, e.g., National Society of Professional Engineers v. United States, supra*, 435 U.S., at 695 n.21 ("[T]he reasonableness of an individual purchaser's decision not to seek lower prices through competition does not authorize the vendors to conspire to impose that same decision on all other purchasers."). Respondents cannot defend their agreement on the theory that a single trader could lawfully adopt the same practice.

II. THERE IS NOTHING ABOUT THE HEALTH CARE INDUSTRY IN GENERAL OR RESPONDENTS' PARTICULAR ACTIVITIES WHICH JUSTIFY EXEMPTING THEIR AGREED-UPON FEE SCHEDULES FROM NORMAL *PER SE* ANALYSIS.

A. *Because There Is No Economic Integration and Because Their Anticompetitive Agreements Are Not Necessary and Ancillary to a Lawful Purpose There Is Nothing in Respondents' Activities Which Creates a Genuine Issue for Trial*

In trying to defend their fee schedules by saying they create "a uniquely desirable product which could not exist unless the foundations themselves establish the maximum levels of reimbursement to be paid," Resp. Br., at 23, respondents either misconprehend or ignore fundamental tenets of the Rule of Reason and the *per se* rule which date back to Judge Taft's seminal opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), *discussed in National Society of Professional Engineers v. United States, supra*, 435 U.S., at 688-92. In his classic analysis distinguishing restraints of trade unlawful on their face and those merely ancillary to lawful contracts, Judge Taft identified economic integration as one of the necessary prerequisites to any escape from the *per se* rule. 85 F., at 280-83. Thus, "when two men become partners in a business, although their union might reduce competition," the partnership would be lawful because the reduction in competition "was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business." *Id.*, at 280. Absent this "union of

. . . capital, enterprise and energy" — absent this economic integration — any agreement between the two men reducing competition between them would be unlawful on its face. *Id.*, at 282-83. *See also* R. Bork, The Antitrust Paradox at 268-69 (1978). Those who wish to avoid the application of the *per se* rule to an agreement which restrains trade must therefore show that the restraint is merely ancillary to an otherwise lawful integration of economic resources.

The necessity of showing economic integration as a precondition of avoiding the *per se* rule has been recognized and preserved in later cases including *Continental T.V.* and *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1978), upon which respondents place such great reliance. *Continental T.V.* dealt with the question of intrabrand competition where consideration had to be given to "efficiencies in the distribution of [the manufacturer's] products," 433 U.S., at 54, and where there was an integration or joint undertaking by the manufacturer and the retailer in the sale of a single product. The licensing agreement in *Broadcast Music* was also part of an extensive economic integration which "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S., at 20. The significance of economic integration was further emphasized in *Broadcast Music* by reference to mergers and joint ventures as two examples where agreements eliminating price competition between competitors would not necessarily be *per se* violations of the antitrust laws. *Id.*, at 23. In both of these examples there would be economic integration — a combination or pooling of productive assets — and it would be this economic integration which would take them out of the *per se* rule. *See also National Society of Professional Engineers v. United States, supra*, 435 U.S., at 688-89.

The medical profession provides a ready supply of specific examples in the same vein as those mentioned in *Broadcast Music*. When two physicians enter a partnership, for example, their agreement precisely fits Judge Taft's classic paradigm and because of the economic integration of productive assets and the sharing of economic risks and benefits their partnership would not be a *per se* violation even though it eliminated competition between them. To the same effect are health maintenance organizations (HMOs), *see* 42 U.S.C.§ 300e *et seq.*, where a group of health care providers combine to furnish integrated and coordinated medical services in

return for fixed pre-paid fees and where the providers bear the economic risk of success or failure of their joint enterprise. Though an HMO may eliminate competition among the participating providers, it should be beyond the scope of the *per se* rule because of the economic integration necessary for the operation of an HMO.

Respondents are far removed from these situations. There is neither integration of productive assets nor any sharing of economic risks and benefits and respondents have not suggested otherwise.[7] Quite to the contrary, respondents readily admit their differences from closed-panel or economically integrated pre-paid medical plans. *See* Resp. Br., at 29. Respondents' members are all independently practicing physicians — there is no pooling of their productive assets. Nor do respondents' members share the prospects of any economic risks or benefits from their joint enterprise — each member is guaranteed the payment prescribed by the foundations' fee schedules and any actuarial risk is borne entirely by third-party payors. J.A. 35. Since their activities are totally devoid of any economic integration, respondents fail to satisfy the most basic requirement for exempting their conduct from the *per se* rule.

Respondents nonetheless seek to avoid their lack of economic integration by suggesting that their fee schedules are necessary for the accomplishment of some other lawful purpose but this argument is without merit. Aside from their establishment of fee schedules, the only other functions that the respondents have ever claimed that they perform are acting "as the agents of participating insurers or self-insured groups" and of performing peer "review [of] the medical necessity and propriety of treatment rendered." Resp. Br., at 8-9. Neither of these functions require that the respondents establish fee schedules, 643 F.2d, at 555, nor has the legality of these two

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[7]Respondents' failure — and, indeed, their inability — to come forward with any justification for their fee schedules has not been missed by the commentators. Considering the Ninth Circuit opinion in this case, for example, Professor Wesley J. Liebeler has written, "While it is certainly desirable to exercise caution in finding new types of arrangements to be illegal *per se*, it is not too much to ask that the defendant come forward with some plausible explanation of how the elimination of competition furthers some legitimate end of the underlying integration. The fact that this was not done in this case is not particularly surprising: there does not appear to be any such explanation." W. Liebeler, *Antitrust Advisor* at 14 (2d ed. 1980 Cum. Supp.).

functions ever been challenged by this suit. Respondents readily admit that they can and do function as insurance administrators or "agents of participating insurers or self-insured groups" without themselves establishing fee schedules. *See, e.g.*, Resp. Br., at 22 n.70; J.A. 405-27. To the same effect, utilization review can and is performed without the need for competitors to agree upon a fee schedule. J.A. 409-22. Respondents' final contention that competitors "themselves [must] establish the maximum levels of reimbursement to be paid" for an effective pre-paid health plan, Resp. Br., at 23, quite simply is demonstratably false. *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co., supra.*

B. *There Is Nothing about the Health Care Industry Which Requires a Trial of the Issue Whether Doctors' Fee Schedules Are Exempt from Normal Antitrust Rules*

Aside from saying over and again that "the challenged conduct in this action concerns pricing in the medical profession," *e.g.*, Resp. Br., at 29, respondents fail to identify a single specific reason why doctors may agree upon fee schedules but other professional groups may not.[8] A party opposing summary judgment has the burden of at least identifying specific material facts which present a genuine issue for trial[9] but respondents have neither addressed nor met that minimal burden.

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[8]Respondents have failed to mention so much as a single characteristic of doctors which distinguish them from lawyers, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); realtors, *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950); pharmacists, *United States v. Utah Pharmaceutical Association*, 371 U.S. 24, *aff'g*, 201 F. Supp. 29 (D. Utah 1962); or accountants, *United States v. Texas State Board of Public Accounting*, 464 F. Supp. 400 (W.D. Tex. 1978), *aff'd*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

[9]Rule 56(e), Federal Rules of Civil Procedure, provides: "When a motion for summary judgment is made . . ., an adverse party may not rest upon the mere . . . denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(f), Federal Rules of Civil Procedure, is an alternative means by which a party opposing a summary judgment motion can simply identify the "facts essential to justify his opposition" even though discovery has not yet been undertaken. At no stage of the proceedings have respondents made any attempt under either Rule 56(e) or 56(f) to identify any specific characteristics of the medical profession which present "a genuine issue for trial."

Rather than coming forward with any specific facts, respondents rely upon footnote 17 in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), where this Court said, "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."[10] Respondents read the *Goldfarb* footnote and the similar language in *Professional Engineers*, 435 U.S., at 686, much too broadly. It may well be that some restraints may receive more lenient antitrust treatment because they occur in "a profession as distinguished from a business" but that certainly does not support respondents' arguments that all restraints within the professions are necessarily treated more leniently or must always be decided at trial. Indeed, both *Goldfarb* and *Professional Engineers* rejected respondents' far-reaching arguments.

Goldfarb, like the present case, involved a fee schedule adopted by a professional association but, unlike this case, those defendants at least offered specific reasons why their conduct should be judged by different antitrust standards than those applied to other sectors of the economy. This Court held that the fee schedule was "a classic illustration of price-fixing," 421 U.S., at 783, and re-

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[10]*Quoted in* Resp. Br., at 34-35. Respondents overlook the fact that this footnote was a qualification of this Court's textual statement that "the exchange of . . . a service for money is 'commerce' in the most common usage of that word." 421 U.S., at 788. Here, as in *Goldfarb*, we deal simply with the exchange of a service for money which is commerce in the most ordinary sense and the considerations acknowledged by footnote 17 do not apply.

Respondents also rely upon *Boddicker v. Arizona State Dental Association*, 549 F.2d 626, 632 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977), where the Ninth Circuit said that "to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession . . . must serve the purpose for which the profession exists, *viz.* to serve the public." Since *Boddicker* was decided prior to *Professional Engineers* which rejected its rationale, respondents' reliance on *Boddicker* is misplaced. Respondents also cite *Veizaga v. National Board for Respiratory Therapy*, 1977-1 CCH Trade Cas. ¶ 61,274 (N.D. Ill. 1977), for the proposition that "whether the questioned conduct was professional or commercial could not be made before trial," Resp. Br., at 29-30, but respondents ignore the fact that this Court has already decided that "the exchange of . . . a service for money is 'commerce' in the most common usage of that word." *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S., at 788.

jected the arguments for an exception: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions." *Id.*, at 787 (citations omitted).

Professional Engineers was to the same effect. There, a professional association sought to justify its ban on competitive bidding because it was adopted "for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." 435 U.S., at 681. This Court rejected the engineers' reliance on the *Goldfarb* footnote saying it "cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions," *id.*, at 696, and held that there was no need to consider "the factual basis for the proffered justification before rejecting it . . . [b]ecause . . . the asserted defense rests on a fundamental misunderstanding of the Rule of Reason . . . ." *Id.*, at 681. Indeed, this Court explicitly rejected the very defense respondents would now raise: "The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.*, at 689. *Accord United States v. Socony-Vacuum Oil Co., supra,* 310 U.S., at 222 ("Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establish one uniform rule to all industries alike.").

Respondents have not even gone so far as the defendants in *Goldfarb* and *Professional Engineers* where the defendants had at least offered specific justifications. Here, the respondents have offered no justification of any sort. Perhaps recognizing respondents' failure to satisfy their burden under Rules 56(e) and 56(f), the Ninth Circuit and the two amici have conjured up a list of supposedly unique characteristics of the health care industry which are suggested either to exempt this industry from normal antitrust rules or to make summary judgment inappropriate. None of these characteristics, however, is unique to the health care industry and, in any event, they have all been rejected by the courts.

Foremost among the supposed reasons for exempting the health care industry is the suggestion that this is a market "in which ordinary competitive forces necessarily operate in a weakened man-

ner." CDS Br., at 3. It may well be that the health care industry is less competitive than other sectors of the economy but that is no justification since "the special characteristics of a particular industry" cannot be an excuse for "monopolistic arrangements." *National Society of Professional Engineers v. United States, supra,* 435 U.S., at 689. Nor is it of any moment whether the anticompetitive character of the health care industry is the result of private agreement, governmental regulation,[11] or some combination of the two. That this industry may be tainted by other anticompetitive agreements is irrelevant: "[T]he fact that there may be somewhere in the background a greater conspiracy from which flow consequences more serious than we have here is no warrant for a refusal to deal with the lesser one which is before us." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188 (1944). Similarly, governmental regulatory action that may have contributed to the anticompetitive nature of the industry is no defense. Even where price-fixing schemes were the direct outgrowth of governmental regulatory programs, this Court has held them to be unlawful. *E.g., Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948); *United States v. Socony-Vacuum Oil Co., supra.* "The Court has already decided that state authorization, approval, encouragement or participation in private anticompetitive conduct confers no antitrust immunity." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976) (footnotes omitted). No weight should be given to the Ninth Circuit's argument that government regulation may have interfered with competitive forces since that argument does not even rise to the level of the defenses which have been repeatedly rejected by this Court. *E.g., National Gerimedical Hospital and Gerontology*

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[11]Thus, Judge Sneed lists "numerous government subventions of the costs of medical care [which] have created both a demand and supply function for medical services that is artificially high," 643 F.2d, at 556, as one of the reasons for denying summary judgment. To the same effect, the amici point to "the extent of government regulation," CDS Br., at 3; *see also* AHA Br., at 11, as a reason for denying relief. No one suggests, however, that respondents' fee schedules were in any way compelled by either the state or federal governments acting in their sovereign capacities, *see Parker v. Brown,* 307 U.S. 341 (1943), or that there is any express exemption from the antitrust law. *See National Gerimedical Hospital and Gerontology Center v. Blue Cross,* ____ U.S. ____, 101 S. Ct. 2415 (1981).

Center Blue Cross, ___ U.S. ___, 101 S. Ct. 2415 (1981); *Cantor v. Detroit Edison, supra*; *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

It has also been suggested that "the third-party payment mechanism," AHA Br., at 2, and "the prevalence of third-party payers," CDS Br., at 3, somehow distinguish the medical profession from other sectors of the economy therefore requiring a different antitrust standard. This is but another variant of the consistently-rejected theme "that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers v. United States, supra*, 435 U.S., at 681. In any event, third-party reimbursement may be used to compensate lawyers, automobile body repair shops and the like, *cf. Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 440 U.S., at 232 n.40, and it cannot be suggested that those businesses are exempted from antitrust scrutiny by the presence of third-party payors. If anything, the third-party payment mechanism is a reason for allowing maximums to be set by a third-party payor rather than a cartel.

It has also been suggested that "the high degree of technological complexity involved," "patient naivete with respect to differences in methods of treatment," and "the general lack of information and knowledge on the part of consumers regarding the necessity for medical treatment or the type or extent of treatment needed," AHA Br., at 11-12, somehow sets apart the medical profession. These characteristics are not unique to the medical profession, *see, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); nor is the medical profession necessarily so esoteric that consumers cannot make effective choices from among competitors thereby driving down the costs of health care.[12] In any event, this Court has already held that considerations of this sort

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[12] *See* Christianson & McClure, *Competition in the Delivery of Medical Care*, 301 New England J. of Medicine 812 (1979); Faltermayer, *Where Doctors Scramble for Patients Dollars*, Fortune Magazine 114 (Nov. 6, 1978); Inglehart, *HMOs Are Alive and Well in the Twin Cities Region*, 10 National Journal 1164 (1978)

cannot excuse a price-fixing scheme. *E.g., National Society of Professional Engineers v. United States, supra,* 435 U.S. 693-96.

Finally, amici argue that the *per se* rule should not be applied because there is no consensus among antitrust law enforcement officials that respondents' conduct is unlawful on its face. CDS Br., at 4, 19-23; AHA Br., at 15-18. The amici point to the Federal Trade Commission as supposedly expressing a dissenting view that a Rule of Reason analysis be applied here. *Ibid.* With all due respect, the amici are in error. The Federal Trade Commission has expressed the view that the *per se* standard is applicable to the present case because of the absence of any economic integration by respondents' member physicians. Federal Trade Commission, *Enforcement Policy with Respect to Physician Agreements to Control Medical Prepayment Plans,* 46 Fed. Reg. 48982, 48989 n.45 (Oct. 15, 1981). The Federal Trade Commission thus joins the Department of Justice which had suggested summary reversal of the Ninth Circuit opinion, the chief law enforcement officers of virtually all 50 states, as well as learned commentators in concluding that the specific practices that respondents engaged in are *per se* unlawful. At least among antitrust law enforcement officials and the commentators,[13] there is the "universal view," *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra,* 441 U.S., at 16, that respondents' activities are *per se* unlawful. This Court should also accept that view.

III. RESPONDENTS' ATTEMPT TO CLOUD THE RECORD MISPERCEIVES THE *PER SE* RULE AND FLIES IN THE FACE OF THEIR OWN CONCESSIONS AND THE LOWER COURT RULINGS

Ignoring the lower courts' rulings that this case "involves a question of law as to which there is substantial ground for difference of opinion," 28 U.S.C.§ 1292(b), and undaunted by their own admission that "the undisputed facts established an agreement

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[13]*See, e.g.,* W. Liebeler, *supra* note 7, at 14; Halper, *The Health Care Industry and the Antitrust Laws: Collision Course?,* 49 Antitrust L.J. 17 (1980); Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act,* 1978 Duke L.J. 645.

among physicians . . . that . . . each would accept as payment in full the amount paid by . . . insurance" they endorsed, Br. Opp., at *i*; *accord* Resp. Br., at *i*; respondents nonetheless argue that the facts in the record are disputed and that further discovery is required before this case can be decided. Neither contention has any merit.

Respondents' plea for some unspecified additional discovery overlooks the fact that "[t]here is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts . . . ." *Brown Shoe Co. v. United States*, 370 U.S. 294, 341 (1962). The *per se* rule, after all, is based in part upon the desire to "avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). Discovery procedures could, as respondents seem to suggest, be used to compile a treatise on medical economics but such a procedure would be a perversion of the *per se* rule. Nothing said by respondents would justify such a "prolonged economic investigation" before deciding this case.

Respondents repeatedly claim that there is a dispute over the reasonableness of their prices and that their prices are lower than others charged in the marketplace, but any inquiry into the supposed reasonableness of prices is foreclosed by *Socony-Vacuum*: "The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions." 310 U.S., at 221. The wisdom of this statement is amply evidenced by respondents' own history. Respondents apparently began their price-fixing scheme in an effort to exclude HMOs from the marketplace which itself would be unlawful, *see* note 2, *supra*, and then validated the assumption this Court made in *Albrecht* that a maximum price schedule "tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S., at 153. During the course of this lawsuit when they had been temporarily enjoined from promulgating new fee schedules, respondents sought permission from the District Court to increase the prices charged by their members by some $1.8 million per month. J.A. 331. Indeed, respondents themselves have argued that their price schedules must

be kept at a sufficiently high level to satisfy their membership, *see* J.A. 322-26, 527-40, and that membership includes most of the physicians practicing in Pima and Maricopa Counties. *See* Pet. Br., at 3. Finally, respondents have used their market power as a price-fixing cartel to foster a variety of other anticompetitive practices. *See id.*, at 6, n.5. There is no need for further inquiry into the reasonableness of respondents' fee schedules.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded with instructions to enter partial summary judgment on the issue of a violation in favor of petitioner.

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